Supreme Court, U.S.
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In The

Supreme Court of the United States

HEALTHCARE RECOVERIES, INC.,

Petitioner,

v.

KYLE M. HAMILTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a health insurer's subrogation claim for the reimbursement of the cost of medical benefits provided to an insured involved in an accident is a "debt" for purposes of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692(a)(5), which applies only to claims arising out of a consumer "transaction"?

LIST OF PARTIES

The parties in the courts below are:

Plaintiff - Appellant - Respondent: Kyle M. Hamilton

Defendant - Appellee - Petitioner: Trover Solutions, Inc. d/b/a Healthcare Recoveries

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel of record for Trover Solutions, Inc., Petitioner, certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. Trover Solutions, Inc. ("Trover"), a publicly-traded Delaware corporation with its principal place of business in Louisville, Kentucky, provides subrogation services on a nationwide basis and is the defendant-petitioner.

2. Errol J. King of McGlinchey Stafford, PLLC in Baton Rouge, Louisiana, is lead counsel for Trover Solutions, Inc.

3. Juston M. O'Brien of McGlinchey Stafford, PLLC in Baton Rouge, Louisiana is co-counsel for Trover Solutions, Inc.

4. United Healthcare of Louisiana, Inc., a health maintenance organization ("HMO") formed and organized under the laws of the State of Louisiana, issued a group health plan policy to Michael R. Hamilton, the father of Kyle M. Hamilton, and provided coverage for medical claims on behalf of Kyle M. Hamilton. United Healthcare of Louisiana, Inc., is a wholly-owned subsidiary of United Healthcare Corporation.

5. Kyle M. Hamilton, 552 Oak Alley Drive, Pearl River, Louisiana, 70452, is the plaintiff-respondent.

CORPORATE DISCLOSURE STATEMENT –
Continued

6. George D. Fagan of Leake & Anderson, L.L.P. of New Orleans, Louisiana, is lead counsel for Kyle M. Hamilton.

7. Karen M. Dicke of Leake & Anderson, L.L.P. of New Orleans, Louisiana is co-counsel for Kyle M. Hamilton.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioner Trover Solutions, Inc. d/b/a Healthcare Recoveries respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on November 1, 2002.

OPINIONS AND JUDGMENTS BELOW

The Opinion, including Judge Emilio Garza's dissent, and Judgment of the panel of the United States Court of Appeals for the Fifth Circuit entered on November 1, 2002, is reprinted in the Appendix at pages App. 1 through App. 24. The Fifth Circuit's January 29, 2003 denial of the request for Rehearing En Banc is reprinted in the Appendix at pages App. 36 through App. 37. The Memorandum and Order of the United States District Court for the Eastern District of Louisiana, dated July 17, 2001 dismissing the Fair Debt Collection Practices Act claim, is reprinted in the Appendix at pages App. 25 through App. 34. The Judgment of the United States District Court for the Eastern District of Louisiana, dated October 3, 2001, is reprinted in the Appendix at page App. 35.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on November 1, 2002 reversing the judgment of the

District Court for the Eastern District of Louisiana, dated October 3, 2001. A timely petition for Rehearing En Banc was denied on January 29, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Fair Debt Collection Practices Act, specifically, Title 15 U.S.C. § 1692a(5):

> *The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.*

STATEMENT OF THE CASE

Introduction

I. Statement Of Facts.

Because the District Court dismissed the Fair Debt Collection Practices Act claim pursuant to Fed. Rule Civ. P. 12(b)(6), the facts as alleged in the complaint must be accepted as true. *Kossick v. United Fruit Co.*, 365 U.S. 731, 732, 81 S.Ct. 886, 888 (1961). However, the legal conclusions stated in the complaint need not be accepted as true. *Fernandez-Montes v. Allied Pilots Association*, 987 F.2d 278, 284 (5th Cir. 1993).

This case is one in a series of cases Plaintiff's counsel has filed attempting to assert that a Louisiana statute, La.

R.S. 22:663, invalidates the contractual subrogation rights of health plans in Louisiana.[1] Plaintiff's counsel has filed similar lawsuits against other major health plans in Louisiana.[2] In an attempt to invoke federal court jurisdiction and broaden the range of plaintiffs for this attack on healthcare subrogation, plaintiff in this case attempts to invoke the Fair Debt Collection Practices Act (referred to hereafter as the "FDCPA" or the "Act") against HRI because HRI administered the subrogation program of one of the health plans plaintiff has sued in another case.[3] The District Court correctly recognized that this effort to transform plaintiff's claims must fail because the FDCPA, by its express terms, does not apply to subrogation services rendered by HRI.

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[1] Subrogation is a routine cost containment process that has been a part of the insurance industry for decades nationwide. Subrogation allows a health insurer to obtain reimbursement from a tortfeasor for medical expenses it has paid to treat one of its insureds who was injured in an accident. Plaintiff's argument is that the concept of subrogation is prohibited by La. R.S. 22:663, which statute forbids insurance policy clauses that expressly reduce benefits under a group health plan solely on the basis that the insured has individual coverage under another plan.

[2] Other cases filed by plaintiff's counsel in Louisiana where La. R.S. 22:663 is being used to attack subrogation are *Julio C. Arana v. Ochsner Health Plan, Inc.*, Docket No. 01-30922 (5th Cir. 2002), *rehearing en banc granted* (5th Cir. Jan. 16, 2003); *Kyle M. Hamilton v. United HealthCare of Louisiana, Inc.*, Suit No. 2001-1073, pending on the docket of the Civil District Court for the Parish of Orleans, State of Louisiana; and *Kyle M. Hamilton v. Healthcare Recoveries, Inc.*, Suit No. 2001-15989, currently pending on the docket of the Civil District Court for the Parish of Orleans, State of Louisiana.

[3] *See Kyle M. Hamilton v. United HealthCare of Louisiana, Inc.*, Suit No. 2001-1073, pending on the docket of the Civil District Court for the Parish of Orleans, State of Louisiana.

The facts as alleged in the complaint are that Kyle M. Hamilton (hereafter "Hamilton") was involved in an automobile accident in 1999. He was injured and hospitalized. United provided medical benefits for Hamilton according to a Certificate of Coverage issued to Hamilton's father, Michael Hamilton.[4] Pursuant to its agreement with Michael Hamilton (Hamilton's father), United was subrogated to Hamilton's recovery against any alleged tortfeasors or insurers. HRI was retained by United to provide subrogation services and administer subrogation recoveries on United's behalf.

Hamilton filed suit in Louisiana state court seeking recovery from the tortfeasors, their liability insurers, and his father's uninsured/underinsured motorist carrier. In August 2000, a lawyer representing United sent a letter to State Farm (the issuer of Michael Hamilton's uninsured/underinsured motorist policies) notifying State Farm of United's subrogation rights.

At some point in time that is unknown to HRI, Hamilton settled an unspecified portion of his state court suit with State Farm. The remainder of Hamilton's state court lawsuit against other tortfeasors is still pending. Hamilton's attorney in the state court suit forwarded approximately

[4] United HealthCare is licensed by Louisiana's Department of Insurance as a health maintenance organization. As such, it issues Certificates of Coverage to its members. Michael Hamilton, as an employee of Building Specialties, Inc., enrolled for coverage with United HealthCare and added to his Certificate of Coverage his dependent son, Kyle Hamilton.

$57,000 to HRI/United in payment of United's subrogation claim.[5]

II. Course Of Proceedings And Disposition In The Courts Below.

Hamilton's original complaint made one claim pursuant to federal law and several claims pursuant to state law against HRI, all based on the same facts. Hamilton claimed that jurisdiction was proper pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) because he made a claim pursuant to the FDCPA (the federal claim). He also contended that the district court had jurisdiction over his state law claims, pursuant to 28 U.S.C. § 1332 (diversity) because, according to Hamilton, the parties were diverse and more than $75,000 was at issue.

HRI filed a Motion for Judgment on the Pleadings or in the Alternative, Motion for Summary Judgment. In its Motion, HRI argued that it was not a "debt collector" within the meaning of the FDCPA and that the subrogation claim that HRI sought to enforce on behalf of United was not a "debt" within the meaning of the FDCPA (App. 27).[6] Hamilton argued that United's subrogation claim

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[5] On appeal before the Fifth Circuit, Hamilton mentioned for the first time that his prior attorney agreed to pay additional monies out of future recoveries. Such an allegation is not included in the complaint. He also refers to three affidavits as authority for this proposition. After a diligent search of these affidavits, counsel for HRI was unable to find any such reference.

[6] HRI also argued in the District Court that, as a disclosed agent for United, it was not independently liable for alleged violations of Louisiana law committed while acting within the scope of its agency (App. 27-28). The District Court did not rule on either this state law defense of HRI or its additional defense under the FDCPA that it was

(Continued on following page)

that HRI sought to enforce arose out of the contract of insurance purchased by Hamilton from United. The District Court treated HRI's motion as a motion to dismiss pursuant to Rule 12(b)(6) (App. 28).

HRI's motion was granted in part, and the district court dismissed Hamilton's FDCPA claim with prejudice on July 17, 2001, thereby dismissing his federal claim (App. 34). The District Court Judge, the Honorable Carl J. Barbier, concluded that the subrogation claim that HRI sought to enforce on behalf of United was not a "debt" within the meaning of the FDCPA (App. 32). Judge Barbier also found that a contractual subrogation claim, while in fact arising out of the contract of insurance, is not the kind of payment obligation that Congress intended when it created the FDCPA for the protection of consumers (App. 32). Judge Barbier noted that each case cited by Hamilton for support involved an obligation to pay as a *quid pro quo* for the consumer goods received. Hamilton's subrogation obligation did not arise until after he was injured in an accident and received settlement funds, and thus involved other transactions wholly unrelated to his contract of insurance with United (*i.e.*, obtaining an uninsured motorist policy through another insurer) (App. 32). For these reasons, the District Court concluded that United's subrogation claim was not a "debt" for purposes of the FDCPA (App. 33). After dismissing Hamilton's sole federal

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not a "debt collector," given that the District Court held that enforcement of a subrogation claim is not the collection of a "debt" within the meaning of the FDCPA (App. 33-34).

claim, the District Court no longer had jurisdiction pursuant to 28 U.S.C. § 1331.[7]

Hamilton filed a notice of appeal on October 2, 2001. The District Court entered a final judgment on October 3, 2001 (App. 35). Hamilton then filed a second notice of appeal on October 9, 2001.

On November 1, 2002, the Fifth Circuit issued its panel opinion reversing the district court. The majority opinion relied upon a broad interpretation of "debt" and "arising out of" to conclude that the FDCPA applied to the insurance subrogation claim of United (App. 11). The majority held that the subrogation claim of United "arose out of" a consumer transaction for insurance and thus, constituted a "debt" for purposes of the FDCPA (App. 11). The dissent by Judge Emilio Garza provided an alternative that is more consistent with the language of the FDCPA and which avoids conflict with other circuits. Judge Garza noted that in each case where other appellate courts found a "debt" to exist under the FDCPA, the alleged obligation arose out of a single transaction (App. 19). Recognizing that the subrogation claim of United arose as a result of a combination of events involving no less than five transactions,[8] Judge Garza reached a conclusion contrary to

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[7] The District Court dismissed Hamilton's remaining state law claims without prejudice on August 15, 2001, on the basis that it did not have subject matter jurisdiction because there was not more than $75,000.00 in controversy (App. 35).

[8] In contrasting the alleged "single transaction" of the majority opinion with what actually occured, Judge Garza set forth the string of events giving rise to United's subrogration claim as: (a) an insurance contract entered into between United and Hamilton; (b) a contract for uninsured and/or underinsured motorist coverage entered into between Hamilton and State Farm; (c) an accident that injured Hamilton; (d)

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the Panel majority (App. 17-18). In finding that the FDCPA was not designed to encompass the subrogation claim of United, Judge Garza correctly pointed to the FDCPA's protection of consumers who were having difficulty paying their debts as opposed to protecting accident victims who attempt to get a windfall by receiving money from multiple sources (App. 24).

Both HRI and Hamilton filed timely petitions for rehearing and rehearing en banc. On January 29, 2003, after requesting additional briefing on the petitions for rehearing en banc, the requests for rehearing were denied.

United's providing for the payment of Hamilton's medical bills; and (e) a settlement payment made by State Farm to Hamilton pursuant to the UM policy.

REASONS FOR GRANTING THE PETITION[9]

III. The Panel's Analysis And Expansive Interpretation Of The Term "Debt" Conflicts With Third, Seventh And Eleventh Circuit Opinions.

3.1 The Third Circuit Has Held That Property Tax Bills Are Not Debts – This Conflicts With The Fifth Circuit's Overly Expansive Interpretation To The Effect That All Obligations Of Consumers Are Debts.

In *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379 (3d Cir. 2000), the Court addressed several claims under the FDCPA. Specifically, the plaintiff contended that the

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[9] Supreme Court Rule 10 provides guidance for the granting of certiorari. It provides:

> *Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:*
>
> > *(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;*
> >
> > *(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;*

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attempts to collect delinquent water bills, delinquent sewer bills and delinquent property taxes were all debts under the FDCPA. The Third Circuit held that the water and sewer bills were covered by the FDCPA, however, the property tax bills were ***not*** covered by the FDCPA. *Id.* at 401. The Third Circuit stated: "the [FDCPA] contemplates that the debt has arisen as a result of the rendition of a service or purchase of property or other item of value. The relationship between the taxpayer and the taxing authority does not encompass the type of pro tanto exchange which the statutory definition of debt envisages." *Id.* at 402 (internal brackets omitted). Not only did the Third Circuit hold that the taxes were not a debt under the FDCPA, but it specifically rejected the plaintiff's argument that the property tax debt arose out of the plaintiff's purchase of the property. Rather, the Third Circuit held that the taxes arose out of the fact of ownership and that there was no transaction.

Applying the logic of the Third Circuit to the facts in Hamilton delineates the nature of the conflict. Hamilton purchased insurance coverage. That premium was paid. That was the transaction between United and Hamilton. It has been fulfilled. There is no claim by United to recover unpaid premiums from Hamilton.

> (c) *a state court or a United States court of appeals has decided an (c) important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

HRI contends that both 10(a) and 10(c) have been met in this application.

Subsequently, Hamilton was injured in an automobile accident that was caused by a tortfeasor. Hamilton recovered money from the tortfeasor's insurer and various other insurers based upon the tortfeasor's liability. That recovery from third parties, through either lawsuits or settlement negotiations, triggered United's subrogation rights. Restated, United's subrogation rights, under the Third Circuit's holding in *Pollice*, arose out of Hamilton's recovery and the automobile accident, not the purchase of insurance. There was no pro tanto exchange that was the source of the obligation. Consequently, there is no debt. The Fifth Circuit's holding that there was a debt creates a conflict between the Third and Fifth Circuits.[10] Accordingly, if the Fifth Circuit's holding is not reversed, then the federal courts will face a broad range of new federal claims and further conflict. HRI's writ should be granted.

3.2 The Seventh Circuit Has Interpreted "Debt" To Be A Limiting Term – This Conflicts With The Fifth Circuit's Expansive Interpretation.

The Fifth Circuit's opinion reads the term "debt" so broadly that almost any obligation to pay on the part of a

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[10] *See*, also, the Second Circuit's decision of *Beggs v. Rossi*, 145 F.3d 511 (1998), where the Court held that personal property taxes levied upon plaintiffs' automobiles were not "debts" within the meaning of the FDCPA, rejecting the argument that because the tax involved in that case was a transaction-based tax, it was subject to the FDCPA. Rather, the Second Circuit found that the tax was not levied upon the purchase or registration of the vehicle *per se*, but rather upon the ownership of the vehicle by the citizen. 145 F.3d at 512. The Second Circuit found that the relationship between the taxpayer and the taxing authority did not encompass that type of *pro tanto* exchange which the statutory definition envisages. *Id.* at 512.

consumer would be covered by the FDCPA. This is directly contrary to the Seventh Circuit's holding in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.,* 111 F.3d 1322, 1324 (7th Cir. 1997), where the Court stated: "not all obligations to pay are considered 'debts' under the Act, the definition of 'debt' thus serves to limit the scope of the FDCPA."

Concerning dishonored checks, the Seventh Circuit held in *Bass* that a "check evidences the drawer's obligation to pay for the purchases made with the check, and should the check be dishonored, the payment obligation remains." The Seventh Circuit's analysis fits clearly within the definition of debt arising from a transaction contained in the FDCPA, and the Act's remedial purpose. The consumer purchases goods with a check – the transaction. The consumer's check is dishonored – his obligation to pay for the transaction is unfulfilled. An obligation to pay arises directly out of the single transaction at issue and fulfills the statutory definition of "debt."

The situation in *Hamilton* is far from that of a single transaction involving a dishonored check. One, there is an insurance policy between Hamilton's father's employer and United. Two, there is also an automobile insurance policy between Hamilton's father and State Farm. Three, Kyle Hamilton is injured in an automobile accident and incurs medical bills. Four, United pays those bills. Five, Hamilton files a state court lawsuit and settles with State Farm, the provider of the father's automobile insurance policy. A portion of that recovery is for medical bills – the same bills that United has already paid. As the panel dissent and the District Court noted, the obligation to pay on behalf of Hamilton did not arise out of the purchase of insurance, and it did not arise out of that single transaction undertaken by the consumer; rather, it arose out of a

series of events and is just **too attenuated** from the purchase of insurance to implicate the FDCPA. Thus, the conflict is that the Fifth Circuit holds that the term "debt" is unlimited, while the Seventh Circuit finds it to be a limiting term.

3.3 The Eleventh Circuit Has Also Limited The Term "Debt."

The Eleventh Circuit stated in *Hawthorne* "that not all obligations to pay are considered debts." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371 (11th Cir. 1998). Further, the Eleventh Circuit noted: "The FDCPA limits its reach to those obligations arising from consensual transactions" and "we do not hold that every consensual or business dealing constitutes a transaction . . . [because] such a holding would be contrary to the plain language of the statute. . . ." This holding conflicts with the Fifth Circuit opinion in *Hamilton* because the *Hamilton* opinion indicates that any obligation to pay related in any way, no matter how attenuated, to any consumer transaction would implicate the FDCPA. That is not the law, that is not the purpose of the FDCPA, and that is certainly not the intent of Congress.

A brief factual recitation of *Hawthorne* follows and then the Fifth Circuit's reasoning is applied to the Hawthorne factual situation to demonstrate the conflict between the two opinions. In *Hawthorne*, there was an automobile accident. Ms. Hawthorne was at fault. The victim's insurer paid the victim's claim and through subrogation sought recovery from Ms. Hawthorne. Mac Adjustment contacted Hawthorne on the insurer's behalf. The Eleventh Circuit held there was no "debt" for purposes

of the FDCPA because the obligation to pay arose out of a tort, the automobile accident. The court concluded that the "FDCPA may be triggered only when an obligation to pay arises out of a specified transaction," and that the plaintiff's subrogation obligation did not arise out of any such consumer transaction, but from the commission of a tort.[11] This opinion has been followed by a federal district court in a factually similar situation to *Hamilton*. *See, Conte v. Health Care Recoveries, Inc.*, No. 99-10062 (S.D. Fla. 2001) (App. 38 through App. 48).[12]

Applying this panel's expansive reading of "arising out of" to the factual situation in *Hawthorne* demonstrates the conflict. Ms. Hawthorne needed to enter into a consumer transaction in order to have an automobile to drive. She either purchased it, leased it, or rented it.[13] But for Ms. Hawthorne having entered into a consumer transaction for

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[11] *Id.* at 1371.

[12] Moreover, the Federal Trade Commission and the Texas Court of Appeals have reached the same conclusion as the *Hawthorne* court – and the Texas Court did so in a case affirming summary dismissal of claims that HRI's assertion of subrogation rights amounted to unfair debt collection. In a May 22, 1987, Staff Opinion addressing whether the FDCPA applies to enforcement of subrogation rights against recoveries from third party tortfeasors, the FTC concluded that "tort claims are not transactions as that term is contemplated in the FDCPA's definition of a debt," and that the obligation to relinquish, through subrogation, monies recovered from tortfeasors is outside the scope of the Act. The Texas Court of Appeals, in construing the term "debt" in a Texas Statute that expressly adopts the FDCPA's definition, held that subrogation obligations which arise only when plan members recover from tortfeasors do not constitute "debt" and that HRI's attempt to enforce such obligations is not "debt collection." *Dickey v. Healthcare Recoveries, Inc.*, No. 03-97-00351-CB (Tx. Ct. App. January 23, 1998).

[13] If she borrowed the automobile then the person who loaned her the automobile had entered into a consumer transaction.

use of the car, she would not have been driving and there would have been no accident. Without an accident there would not have been any subsequent injuries, an insurance claim and a subrogation claim. Therefore, applying the Fifth Circuit majority's analysis, the claim in *Hawthorne* arose from a consumer transaction and constitutes a debt. Yet, the Eleventh Circuit held otherwise.[14] Thus, the conflict is apparent and there is a necessity for review.

Placing the analysis of the Eleventh Circuit in *Hawthorne* and the analysis of the Fifth Circuit in *Hamilton* side by side clearly indicates the inherent conflict between the two opinions. In both there was an automobile accident. In both there was a tortfeasor. The *Hawthorne* court held that the health care plan's efforts to collect damages from the tortfeasor in *Hawthorne* were not debts under the FDCPA. On the other hand, the Fifth Circuit held that efforts by the health care plan to collect damages from an insured who has been compensated by an insurer responsible for the tortfeasor's debt is covered under the FDCPA. This, in effect, results in the following Circuit conflict: Under the Eleventh Circuit's reasoning the health plan

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[14] As noted by Judge Emilio Garza in dissent, reliance on *Brown v. Budget Rent-A-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997) is misplaced. In *Brown*, the sole issue was whether the FDCPA required an extension of credit to the consumer. The District Court held that one was required. The Eleventh Circuit reversed and remanded. As the Eleventh Circuit later stated "Although we have recently held that a 'debt' need not require the extension of credit, see *Brown*, 119 F.3d at 922, we have not previously addressed the limits of the FDCPA's definition of debt." *Hawthorne*, 140 F.3d 1367, 1371 (11th Cir. 1998). Thus, "The *Hawthorne* Court did not state that the obligation in *Brown* should be considered a 'debt' for purposes of the FDCPA." *Hamilton v. United HealthCare of Louisiana, Inc.*, No. 01-31179 (5th Cir. Nov. 1, 2002) slip op. at p. 19 n.5 (Judge Emilio Garza *dissenting*).

can seek to recover its damages because the cause of the damages arises from a tort and that is **not** covered by the FDCPA. On the other hand, under the Fifth Circuit's logic, efforts to recover that same money arises out of the contract of insurance and is covered by the FDCPA.

The health plan is attempting to recover the same money arising out of the same set of operative facts and the same damage, but, the FDCPA's applicability is different depending upon the Circuit. Consequently, based upon this split within the Circuits this Court[15] should grant the writ.

In sum, the Third, Seventh and Eleventh Circuits, three district courts and one state intermediate appellate court have all limited the term debt in such a manner that Hamilton's claim would not be viable under the FDCPA. The Fifth Circuit's opinion conflicts with this weight of authority. Based upon this conflict, the writ should be granted.

IV. Subrogation Interests Are Tort Claims – Not Consumer Debts.

Subrogation interests arise out of tort claims. There must necessarily be an accident for the claim to arise. As such, subrogation claims are not the type of consumer debts contemplated by the FDCPA. The subrogation claim asserted by HRI on behalf of United is, in reality, a claim asserted against the negligent third parties who caused Hamilton's injuries and, as such, is in the nature of a tort

[15] The only reported district court opinion addressing this issue held that there was no debt. *See Garner v. Augustine*, No. 93 C 5698, 1994 WL 48589 (N.D. Ill. Feb. 16, 1994).

claim – not a consumer debt. Instead of being in the nature of a "debt," subrogation is an equitable doctrine whereby a party steps into the shoes of another, so that the new party gains the right of the former party regarding a claim.[16] A reimbursable subrogation interest does not arise unless and until an individual sustains an injury in an accident and then asserts a tort claim against third party tortfeasors. If any settlement funds are recovered and held by the insured for the benefit of the insurer subrogee, then these funds are not analogous to money owed to a creditor by a consumer for the purchase of some product or service.

Courts have consistently held that tort liability does not constitute "debt" within the meaning of the FDCPA. As subrogation interests arise from tort claims, this is important. For example, the Third Circuit, in holding that potential tort liability for conversion did not amount to debt collection, held that

> *Nothing in the statute or its legislative history leads us to attribute to Congress a purpose to protect against a perceived problem with the use of abusive practices in collecting tort settlements from alleged tortfeasors due to threats of legal action. Nothing in the statute or the legislative history leads us to believe that Congress intended to*

[16] *See*, Louisiana Civil Code Article 1825 – subrogation is the substitution of one person to the rights of another. *See*, *also*, Revision Comment to Civil Code Article 1826 in that, "subrogation is a legal fiction admitted or established by the law by virtue of which an obligation, extinguished with regard to the original creditor by payment which he has received from a third person or from the debtor himself but with funds that a third person has furnished to that effect, is regarded as subsisting in favor of this third person who is entitled to assert . . . the rights and actions of the ancient creditor."

equate asserted tort liability with asserted consumer debt.[17]

Moreover, no public policy is served by expanding the FDCPA beyond the intent of Congress. To do so, would be to transform every obligation owed by a consumer into a federal case finding its way to the docket of the federal courts. Rather, the FDCPA was passed in response to complaints from consumers of unconscionable and unreasonable tactics used by consumer debt collectors. It was intended to protect individuals who fail to meet their obligation to repay purchase money from harassment by debt collectors hired by the creditor. Hamilton can point to no evidence – because there is none – that would show the use of any unconscionable or unreasonable tactic by HRI. Public policy clearly supports the District Court's refusal to rewrite the FDCPA to include subrogation interests in addition to consumer debt.

[17] *Zimmermann v. HBO Affiliate Group*, 834 F.2d 1163, 1168 (3rd Cir. 1987); *see, also, Shorts v. Palmer*, 155 FRD 172, 175-76 (S.D.Ohio 1994) (threat of litigation for civil theft is not debt collection); *Information FTC Opinion* dated May 22, 1987 (holding that tort liability does not constitute a debt).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31179

KYLE M. HAMILTON — Plaintiff,

versus

UNITED HEALTHCARE OF LOUISIANA, INC., — Defendant.

KYLE M. HAMILTON — Plaintiff-Appellant,

versus

HEALTHCARE RECOVERIES, INC., — Defendant-Appellee.

Appeals from United States District Court
for the Eastern District of Louisiana

(Filed Nov. 1, 2002)

Before DAVIS, EMILIO M. GARZA and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

Kyle M. Hamilton appeals from the dismissal of his Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. (1997), claim against Healthcare Recoveries, Inc. ("HRI"), as well as from the district court's determination that it lacked diversity jurisdiction. He also

appeals from the district court's refusal to allow him to amend his complaint. For the following reasons, we REVERSE in part, AFFIRM in part, and REMAND for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In October of 1999, Hamilton was seriously injured in a single-vehicle automobile accident in which he was a passenger. As a result of the accident, Hamilton required medical and other treatment. Defendant, United Healthcare of Louisiana, Inc. ("United"), had in force a group health plan, offered through Hamilton's father's employer, pursuant to which Hamilton was insured as a dependent. Pursuant to that coverage, United paid for certain of the medical and other services necessitated by the accident, allegedly totaling in excess of $100,000. At the time of the accident, Hamilton's father also had in effect uninsured and/or underinsured motorist ("UM") coverage pursuant to two polices with State Farm Insurance Company ("State Farm"). State Farm paid nearly $250,000 in UM benefits and $5,000 in MedPay benefits to Hamilton pursuant to those policies. Shortly thereafter, HRI, acting pursuant to its contract with United,[1] began sending notices to Hamilton's father and State Farm in an attempt to enforce subrogation rights that United claimed to have against any of the proceeds that Hamilton might receive from third parties, including his own insurer State Farm. State

[1] HRI provides subrogation enforcement services for insurers such as United pursuant to a contractual agreement with the insurer. HRI and United are wholly separate business entities with no common ownership.

Farm, through Hamilton's counsel, subsequently paid $57,757.06 out of the $250,000 UM policy proceeds, to which Hamilton would have otherwise been entitled, to HRI on behalf of United. Hamilton then retained new counsel who attempted to recover the monies that United had obtained from State Farm. On February 2, 2001, counsel sent United a letter outlining in detail why Louisiana Revised Statutes Sections 22:2006(7) and 22:663 precluded the type of subrogation claims that United had made against the State Farm proceeds. Attached to that letter was a copy of a state court petition. Hamilton's state lawsuit sought to recover the funds paid to United through HRI and asked the Court to enjoin any further attempts by United to either coordinate benefits or subrogate claims to any future proceeds under the State Farm policies. United removed the case to federal court alleging that ERISA completely preempted Hamilton's state law claims. After United removed, Hamilton filed a putative class action, naming HRI as defendant. In that suit, Hamilton alleged that HRI's acts during its recovery of funds from himself and others violates the FDCPA, as well as the Louisiana Unfair Trade Practices Act, La.Rev.Stat.Ann. § 51:1401, et seq. (West 1987) ("LUTPA"). The two cases were subsequently consolidated and the defendants in both cases filed motions to dismiss. Thereafter, the district court remanded the United suit to state court. *Hamilton v. United Health Care of La.,* Nos. Civ. A. 01-585 & 01-650, 2001 WL 536300, at * 7 (E.D. La. May 17, 2001). The district court then considered HRI's Motion for Judgment on the Pleadings and Alternative Motion for Summary Judgment, which the court treated as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). By an order entered on July 17, 2001, the motion was granted in part, and the court dismissed Hamilton's FDCPA claim

with prejudice, finding that Hamilton failed to state a claim because HRI was not collecting a "debt" under the FDCPA.

On August 21, 2001, the district court concluded that no independent basis for federal subject matter jurisdiction existed over the remaining state law claims because Hamilton failed to establish that the amount in controversy exceeded $75,000 for purposes of diversity jurisdiction. The court refused to exercise supplemental jurisdiction over the state law claims. As such, the state law claims were dismissed without prejudice. Hamilton then filed a Motion for Reconsideration and Motion for Leave to File a Supplemental and Amended Complaint seeking to add new theories of recovery in order to cure the amount-in-controversy defect. The district court denied these motions. In doing so, it concluded that the proposed amendments to Hamilton's complaint would not cure the amount in controversy defect. Judgment was entered and Hamilton appealed.

STANDARD OF REVIEW

We review a Rule 12(b)(6) dismissal *de novo,* accepting all well-plead facts as true. *Abrams v. Baker Hughes, Inc.,* 292 F.3d 424, 430 (5th Cir. 2002). Questions of fact are viewed in the light most favorable to the plaintiffs, and questions of law are reviewed *de novo. Mowbray v. Cameron County, Tex.,* 274 F.3d 269, 276 (5th Cir. 2001). "Rule 12(b)(6) motions should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Castro Romero v. Becken,* 256 F.3d 349, 353 (5th Cir. 2001) (internal quotations and citations omitted).

DISCUSSION

The FDCPA was enacted in part "to eliminate abusive debt collection practices by collectors." 15 U.S.C. § 1692(e) (1997). "As such, the FDCPA enumerates several practices considered contrary to that goal, and forbids debt collectors from taking such action." *Poirier v. Alco Collections, Inc.*, 107 F.3d 347, 349 (5th Cir. 1997). For the FDCPA to apply, the obligation at issue must qualify as a "debt," defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." § 1692a(5).

The district court dismissed Hamilton's FDCPA claim pursuant to Rule 12(b)(6) after concluding that the subrogation claim that HRI sought to enforce on behalf of United was not a "debt" within the meaning of the FDCPA. The court began its analysis by noting that several key elements of the term "debt" appear to be present in this case. The court concluded that Hamilton entered into a consensual "transaction" for "insurance" and purchased that insurance for "personal or family use" for which Hamilton was "obligated to pay money" to United if its subrogation claim was valid. The court found that the question of whether Hamilton's obligation to pay "arises out of" his transaction with United to be more problematic. The court recognized that "but for" Hamilton's health insurance contract with United, his recovery on the UM proceeds would create no obligation. However, in rejecting Hamilton's argument that the "debt" arose out of his contract with United, the court relied on *Garner v. Augustine, Kern & Levens, Ltd.*, No. 93 C 5968, 1994 WL 48589 (N.D. Ill.

Feb.16, 1994). In *Garner,* Health Care Services Corporation ("Health Care") administered group health and welfare benefit plans for a number of employers, including Garner's employer. 1994 WL 48589, at * 1. Garner was a member of that plan. Garner's daughter was injured and Health Care paid medical benefits to cover her medical care. Health Care filed suit for reimbursement of the benefits paid after Garner refused to respond to Health Care's requests for information, which would allow it to assess whether it had any reimbursement rights by reason of Garner's recovery from a third party, or to subsequent letters from Health Care's counsel. When Health Care's counsel learned that there was no right of reimbursement, the suit was voluntarily dismissed. Garner then filed a claim against the law firm representing Health Care, and one of its partners, under the FDCPA and state law. The district court held that Health Care's reimbursement claim against its insured was not a "debt" for purposes of the FDCPA. *Id.* at -3. The court reasoned that the inclusion of "debts" relating to insurance in § 1692a(5) was "obviously aimed at a consumer who contracts for insurance coverage and then does not pay the premium." *Id.* at *2. The court further concluded that the FDCPA was "*not* intended to cover the situation here, where an employee or his or her beneficiary under an employee benefit plan has received benefits that may give rise to a reimbursement obligation under that plan, then fails to respond to the plan's bona fide inquiries as to the facts that bear on the existence or nonexistence of the employees' or beneficiary's duty of reimbursement, so that the insurer is forced to sue." *Id.* To hold otherwise, the court concluded, "would unduly strain the normal meaning of the language that has been used by Congress" in the FDCPA. *Id.*

Based on *Garner,* the district court concluded that a contractual subrogation claim, while in fact "arising out of" the contract of insurance, is not the kind of payment obligation that Congress intended when it created the FDCPA for the protection of consumers.

Hamilton contends that HRI's claims against Hamilton "arise[ ] out of a transaction in which the . . . insurance [that is] the subject of the transaction [is] primarily for personal, family, or household purposes." § 1692a(5). He asserts that the district court erred by failing to find that HRI's enforcement of United's contract-based subrogation rights for reimbursement of benefits paid by United as Hamilton's group health insurer constitutes a "debt" under § 1692a(5). To support this position, Hamilton cites *Pollice v. Nat'l Tax Funding, L.P.,* 225 F.3d 379, 401 (3d Cir. 2000) ("[T]he plain meaning of section 1692a(5) indicates that a 'debt' is created whenever a consumer is obligated to pay money as a result of a transaction whose subject is primarily for personal, family or household purposes."). Further, he argues that the district court's determination that the contractual subrogation claim was too attenuated from the original purchase of insurance to be a "debt" under the FDCPA is contrary to the broad protections afforded by the FDCPA.

Hamilton claims that *Garner* is distinguishable because it involved a self-funded plan, whereas Hamilton's health plan is an insured plan, and here, Louisiana Revised Statute Section 22:663 prohibits United from seeking reimbursement. He argues that *Garner*'s limitation on the scope of "debts" – i.e., its conclusion that the FDCPA's inclusion of insurance was meant to address only non-payment of premiums by an insured – was based upon

the erroneous assumption that there must be an extension of credit to the consumer.

Additionally, Hamilton claims that his purchase of the United insurance policy is the consumer transaction that gave rise to United's obligations to pay medical benefits and its alleged right to seek reimbursement out of the proceeds of his recoveries against third parties. In support of his claim that the reimbursement obligation arose from the purchase of insurance, Hamilton relies on *Brown v. Budget Rent-A-Car Sys., Inc.*, 119 F.3d 922 (11th Cir. 1997). In *Brown*, Brown rented a truck and dolly from Budget, and also paid for Loss Damage Waiver ("LDW") protection. *Id.* at 923. While operating the truck, Brown ran into an overpass, and Budget sought reimbursement from Brown and his insurance company. Brown's insurance carrier paid for damage to the truck, but Brown refused to pay the deductible or loss of use fees because he believed they were encompassed by the LDW. Budget contended that LDW coverage did not apply and that Brown violated the restrictions clause in the rental agreement, and retained collection agents to initiate collection activities against Brown. Brown filed suit against the collection agents under the state law and the FDCPA, and the district court dismissed the complaint pursuant to Rule 12(b)(6). The court found that because the alleged obligations did not arise from an "extension or offer of credit," there was no "debt" as defined by the FDCPA. *Id.* at 924. On appeal, the Eleventh Circuit held that as long as the consumer transaction creates an obligation to pay, a "debt" is created, and that the extension of credit is not a prerequisite to existence of a "debt" under the FDCPA. *Id.* The court concluded that "Budget's assertion that Brown is obligated as a result of a consumer

transaction suffices to bring the obligation" within the term "debt." *Id.*

HRI counters that there is no "debt" within the definition of the FDCPA because the "subject of the transaction" from which the obligation to pay arose is not "primarily for personal, family or household purposes." § 1692a(5). Contrary to Hamilton's assertion that the consumer "transaction" was the purchase of insurance, HRI claims that Hamilton's reimbursement obligation arose out of the automobile accident and his subsequent recovery of money from a third party. Further, HRI asserts that *Garner* is directly on point, holding that the FDCPA does not apply to subrogation/reimbursement claims because they do not arise out of a consumer transaction. HRI claims that, like in *Garner,* its August 29, 2000 letter was designed to determine whether there was a reimbursement obligation, not as an attempt to collect an alleged debt because the reimbursement claim did not arise out of a consumer transaction.

Further, citing *Hawthorne v Mac Adjustment, Inc.,* 140 F.3d 1367, 1372 (11th Cir. 1998), HRI asserts that *Brown* is distinguishable because it concerned whether the FDCPA requires an extension of credit and did not address whether the alleged debt arose pursuant to a consumer "transaction." In *Hawthorne,* the Eleventh Circuit held that a debt arising from tortious conduct on the part of the defendants does not constitute a consumer transaction for purposes of the FDCPA. *Id.* at 1373. In discussing its holding in *Brown,* the court stated in part as follows:

> We held that the FDCPA does not require the extension of credit to be applicable to an obligation. We did not consider the question of whether the

> obligation at issue in *Brown* involved a "transaction" under the FDCPA. It is clear, however, that the facts delineated in *Brown* do not exclude the possibility that the obligation in that case constituted a "debt" under the FDCPA, as Brown's obligations arose at least in part out of a business transaction where Brown contracted for what appear to be personal services (the truck rental and the loss damage waiver protection).

Id. Because no such "transaction" – i.e., contract, business, or consensual arrangement – occurred in *Hawthorn,* the court held that *Brown* did not require the court to conclude that the tort obligation at issue was covered by the FDCPA. *Id.*

As with all issues of statutory interpretation, the appropriate place to begin our analysis is with the text itself. *Hughey v. United States,* 495 U.S. 411, 415 (1990). We agree with the Seventh Circuit's determination that the FDCPA's definition of "debt" is plain. *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.,* 111 F.3d 1322, 1324 (7th Cir. 1997). The definition is not " 'beset with internal inconsistencies [or] burdened with vocabulary that escapes common understanding.' " *Id.* (quoting *EEOC v. The Chicago Club,* 86 F.3d 1423, 1434 (7th Cir. 1996)). In the absence of ambiguity, our inquiry ends with the text itself. As the *Bass* court noted:

> [T]he plain language of the Act defines "debt" quite broadly as "any obligation to pay arising out of a [consumer] transaction." In examining this definition, we first focus on the clear and absolute language in the phrase, "any obligation to pay." Such absolute language may not be alternatively read to reference only a limited set of

> obligations. . . . As long as the transaction creates an obligation to pay, a debt is created.

Id.

A fundamental canon of statutory construction instructs that in the absence of a statutory definition, we give terms their ordinary meaning. *Perrin v. United States,* 444 U.S. 37, 42 (1979). "'Arising out of' are words of much broader significance than 'caused by.' They are ordinarily understood to mean 'originating from [,]' 'having its origin in,' 'growing out of' or 'flowing from,' or in short, 'incident to, or having connection with.'" *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co. of Wi.,* 189 F.2d 374, 378 (5th Cir. 1951); *see also* BLACK'S LAW DICTIONARY 102 (7th ed. 1999) (defining "arise" as originating or stemming from). Moreover, the ordinary meaning of the term "transaction" is a broad reference to many different types of business dealings between parties, and does not connote any specific form of payment. *Bass,* 111 F.3d at 1325 (citing WEBSTER'S NEW WORLD DICTIONARY 1509 (2d ed. 1986) (defining "transaction" simply as "a business deal or agreement")). We cannot avoid the inescapable conclusion that the plain meaning of "debt" encompasses the funds owed in this case. There is no question that the obligation to pay arose out of Hamilton's transaction of purchasing insurance. HRI is simply incorrect in its assertion that the obligation to pay arose out of a tortious act. *Hawthorne* itself suggests that Hamilton's obligations arose out of a consumer transaction for purposes of the FDCPA. As opposed to *Hawthorne,* where Hawthorne's obligations arose from tort law, Hamilton's obligations arose from a business transaction where Hamilton contracted for personal and family services, i.e., insurance.

Moreover, the plain meaning of "arising out of" as "stemming from" leads us to conclude that the obligation to pay arose from the contract/transaction for insurance.

The district court and *Garner*'s interpretation of the definition of "debt" is too narrow. As the Supreme Court stated in *Hubbard v. United States,* we are prohibited from reading into clear statutory language a restriction that Congress itself did not include. 514 U.S. 695, 703 (1995) ("[A]bsent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it." (internal quotations and citation omitted)).

Finally, while "Fifth Circuit law is crystal clear that when, as here, the language of a statute is unambiguous, this Court has no need to and will not defer to extrinsic aids or legislative history," our review of the legislative history brings forth nothing that contradicts our statutory interpretation. *See Guilzon v. Comm'r of Internal Revenue,* 985 F.2d 819, 823 n.11 (5th Cir. 1993). Congress, through the FDCPA, has legislatively expressed a strong public policy disfavoring dishonest, abusive, and unfair consumer debt collection practices, and clearly intended the FDCPA to have a broad remedial scope. *See* S. REP. NO. 382 at 4 (1977) ("In addition to [the] specific prohibitions, this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698; *Wright v. Fin. Serv. of Norwalk, Inc.,* 22 F.3d 647, 650 (6th Cir. 1994) (en banc) (explaining that Congress wrote broad language into the FDCPA to forestall abusive practices by debt collectors). For these reasons, and because we agree with the *Bass* court's

conclusion that the meaning of "debt" is clear, we hold that the district court erred in concluding that Hamilton's obligation to pay HRI did not fall under the FDCPA. *See Bass,* 111 F.3d at 1325.

HRI next offers an alternative argument in support of the district court's Rule 12(b)(6) dismissal of Hamilton's complaint. HRI contends that it is not a "debt collector" within the meaning of the statute. Instead, it maintains that it is excluded pursuant to the exemption set forth in § 1692a(6)(F)(iii), which states that a "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such a person." Hamilton vigorously disagrees.

For purposes of dealing with this argument, we must remain within the bounds of review permitted for a dismissal pursuant to Rule 12(b)(6). Although HRI filed a motion for summary judgment, the district court explicitly stated that it was dismissing the case on 12(b)(6) grounds. The district court commented on HRI's alternative "debt collector" argument; however, its decision was in no way predicated on it. When dealing with HRI's argument, the court noted that it "need not address the parties' arguments on the 'debt collector' issue" because the "debt" issue was dispositive. *Hamilton v. United Healthcare of La.,* Nos. Civ. A. 01-585 & 01-650, 2001 WL 812076, at *4 (E.D. La. July 16, 2001).

After considering the district court's opinion, the parties' contentions, and the particular language of the statutory exclusion in dispute, we conclude that further appellate review is foreclosed by Rule 12(b)(6). The rule

constrains us to scrutinize the complaint only. Resolution of the "debt collector" issue in this case is clearly tied to a determination of the circumstances surrounding the inception of the debt. Accordingly, we REMAND to the district court for further consideration of this issue.

Finally, Hamilton urges that the court erred in dismissing its remaining claims because diversity jurisdiction existed. HRI does not dispute that the parties are diverse; instead, it maintains that Hamilton has failed to meet the amount-in-controversy requirement. The crux of Hamilton's argument is that attorneys' fees will raise the amount-in-controversy well above $75,000.

The district court noted that attorneys' fees may be imputed to a class representative; however, it also observed that we have held that imputing fees to a class representative is only permitted when a statute explicitly provides for attorneys' fees. *Graham v. Henegar,* 640 F.2d 732, 736 (5th Cir. 1981). Further, when a statute awards attorneys' fees to the named plaintiffs in a class action, the fees are attributed solely to the class representatives. *In re Abbott Labs.,* 51 F.3d 524, 526-27 (5th Cir. 1995); § 1692k(a)(B), (a)(3). Since the court had already dismissed the FDCPA claim, the court focused on the remaining statutory claim, the LUTPA claim. Concluding, correctly, that the LUTPA does not allow class action claims, and that Hamilton's personal fees would not be enough to push Hamilton above the amount-in-controversy

requirement, the court held that it did not have diversity jurisdiction. We find no error in this assessment.[2]

CONCLUSION

For the foregoing reasons, we REVERSE the district court's determination that the funds at issue in this case do not qualify as a "debt" under the FDCPA and REMAND for further proceedings not inconsistent with this opinion. We also AFFIRM the district court's decision that diversity jurisdiction did not exist in this case.

REVERSED in part, AFFIRMED in part, and REMANDED.

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority's conclusion that the district court correctly dismissed Hamilton's remaining claims for lack of subject matter jurisdiction. In addition, I agree that it would be inappropriate for us to rule on the issue of whether Healthcare Recoveries, Inc. ("HRI") constitutes a "debt collector" under the Fair Debt Collection Practices Act ("FDCPA"). I cannot, however, agree with the majority's conclusion that an obligation to pay an insurance subrogation claim constitutes a "debt" under the FDCPA.

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[2] We also find nothing erroneous in the district court's decision to deny Hamilton's request to amend his complaint. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that leave to amend need not be given when amendment would be futile).

The FDCPA defines a "debt" as follows:

> [A]ny obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5) (2000).

The majority opinion focuses on the words "any obligation" and "arising out of," and concludes that the FDCPA applies to an insurance subrogation claim. The reasoning in the majority opinion appears to be as follows: United Health Care of Louisiana, Inc. ("United") agreed to provide insurance for Hamilton (via an agreement with his father's employer). That insurance agreement is a "transaction" that is "primarily for personal, family, or household purposes" because it provides health care insurance for employees and their families. The agreement is a "but for" cause of United's subrogation claim, for, without the agreement, United would have no claim for reimbursement. Therefore, the majority concludes, the subrogation claim "arises out of" a consumer transaction for insurance, and constitutes a "debt" for purposes of the FDCPA.

I doubt, however, that the matter is so simple. The word "debt" as defined in the FDCPA does not have the expansive scope that the majority's analysis suggests. The Seventh Circuit (whose decisions are relied on extensively by the majority opinion) has reasoned that "not all obligations to pay are considered 'debts' under the [FDCPA]." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir. 1997). On the contrary, "the

definition of 'debt' . . . serves to limit the scope of the [Act]." *Id.*; *see also Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1371 (11th Cir. 1998) ("[W]e do not hold that every consensual or business dealing constitutes a 'transaction' triggering application of the FDCPA (such a holding would be contrary to the plain language of the statute limiting applicability to specified transactions . . .)."). [1]

In addition, only an extremely broad interpretation of "arising out of" could lead the majority to conclude that United's subrogation claim "aris[es] out of" the single transaction between United and Hamilton. The subrogation claim asserted by United arose out of a string of events. First, there was the insurance contract between United and Hamilton. Second, there was the contract for uninsured and/or underinsured motorist coverage ("UM policy") between Hamilton and State Farm. Third, there was the accident that injured Hamilton. Fourth, there was United's payment of Hamilton's medical bills. Fifth, there

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[1] The majority opinion refers to language in *Bass* suggesting that the FDCPA should be given a broad interpretation. It is important to keep in mind the context of the *Bass* court's statements. The Seventh Circuit was determining whether it should follow dicta from the Third Circuit's decision in *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir. 1987). *Zimmerman* suggested that the FDCPA applied only to obligations involving an "extension of credit," such as credit card debts or other situations in which a consumer defers payment on an item. *Id.* at 1168-69. The Seventh Circuit, in discussing the "absolute language" of the FDCPA, was determining only that the *Zimmerman* court was wrong to limit the Act to obligations involving an extension of credit. *Bass*, 111 F.3d at 1325. As the language quoted in this dissent makes clear, the *Bass* court did *not* mean that there were no limitations on the definition of "debt." *See also Duffy v. Landberg*, 133 F.3d 1120, 1123 (8th Cir. 1998) (also referring to the broad wording of the Act in order to reject the dicta in *Zimmerman*).

was the payment by State Farm to Hamilton pursuant to the UM policy. So, although one might say that this subrogation claim arose out of the underlying insurance agreement between United and Hamilton, one could also say that the claim arose out of any one of these other events. It would be most accurate to say that the subrogation claim arose out of the combination of events, and not out of a single transaction.[2]

Nevertheless, the majority opinion concludes that "[t]here is no question that the obligation to pay arose out of Hamilton's transaction of purchasing insurance." The opinion supports this conclusion by asserting that this Court has given the phrase "arising out of" an expansive interpretation. It is true that we have construed the phrase broadly when interpreting *insurance policies. See Am. States Ins. Co. v. Bailey,* 133 F.3d 363, 370 (5th Cir. 1998) ("This court has held that the words 'arising out of,' *when used within an insurance policy,* are 'broad, general, and comprehensive terms effecting broad coverage.' . . . The words are 'understood to mean "originating from," "having its origin in," "growing out of," or "flowing from."'") (quoting *Red Ball Motor Freight, Inc. v. Employers Mut. Liab. Ins. Co. of Wis.,* 189 F.2d 374, 378 (5th Cir. 1951)) (emphasis added); *Jarvis Christian Coll. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 197 F.3d 742, 747 n.5 (5th

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[2] The district court wisely noted the degree to which United's subrogation claim is attenuated from the underlying contract. *See Hamilton v. United Healthcare of La., Inc.,* Nos. Civ.A. 01-585, 01-650, 2001 WL 812076, at *3 (E.D.La. July 16, 2001) ("[H]ad Plaintiff not engaged in another transaction *wholly unrelated* to his contract with United, *i.e.,* obtaining his own UM policy through another insurer, no obligation would exist.") (emphasis added).

Cir. 1999) (same). We have not, however, consistently used this expansive interpretation of "arising out of" in the context of interpreting *federal statutes. See Humphries v. Various Fed. USINS Employees,* 164 F.3d 936, 942-44 (5th Cir. 1999) (noting, in a case involving a federal statute, the different interpretations given by courts to terms such as "arising from" and "arising out of"). Therefore, a broad interpretation of "arising out of" may not be appropriate in this context.

Indeed, the case law in this area provides no support for the majority opinion's expansive interpretation of "arising out of." Each case in which other appellate courts found a "debt" to exist under the FDCPA involved an obligation that arose out of a single transaction. Thus, courts have determined that an obligation to pay home owner's association dues, *Ladick v. Van Gemert,* 146 F.3d 1205, 1207 (10th Cir. 1998); *Newman v. Boehm, Pearlstein & Bright, Ltd.,* 119 F.3d 477, 482 (7th Cir. 1997), an obligation to pay for water and sewer service, *Pollice v. Nat'l Tax Funding, L.P.,* 225 F.3d 379, 401 (3d Cir. 2000), an obligation to make good on a dishonored check, *Snow v. Jesse L. Riddle, P.C.,* 143 F.3d 1350, 1353 (10th Cir. 1998); *Duffy,* 133 F.3d at 1124; *Charles v. Lundgren & Assoc., P.C.,* 119 F.3d 739, 742 (9th Cir. 1997); *Bass,* 111 F.3d at 1330, and an obligation to pay back rent, *Romea v. Heiberger & Assoc.,* 163 F.3d 111, 119 (2d Cir. 1998), all constitute "debts" under the FDCPA. In each case, the obligation was a promise to pay for a particular good or service. In each case, the obligation at issue depended on a single transaction.

In cases where courts have found no "debt," the relationship between the obligation and the consumer transaction was more attenuated. For example, courts

have held that the obligation to pay property taxes does not constitute a debt for purposes of applying the FDCPA. *Pollice,* 225 F.3d at 401-02; *Beggs v. Rossi,* 145 F.3d 511, 512-13 (2d Cir. 1998). The obligation to pay property taxes does, in a sense, "arise out of" the purchase of a home. Indeed, under the majority's expansive interpretation of "arising out of," it would be nearly impossible to conclude otherwise. After all, the purchase of a home is a "but for" cause of the obligation to pay property taxes. In *Pollice,* however, the Third Circuit found that the obligation to pay property taxes did not arise from the purchase of property, but rather from the "*fact of ownership.*" 225 F.3d at 402 (emphasis in original). The Third Circuit declined to adopt an interpretation of "arising out of" as expansive as that of the majority in this case. Indeed, no case appears to support the majority opinion's broad reading of "arising out of."[3]

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[3] Hamilton relies on *Brown v. Budget Rent-A-Car Systems, Inc.,* 119 F.3d 922 (11th Cir. 1997), for the proposition that a "debt" under the FDCPA does not have to arise out of a single transaction. In that case, Brown rented at truck and dolly from Budget. *Id.* at 923. Not long after leaving the rental agency, Brown was in an accident. *Id.* Budget demanded that he pay for the repair of the vehicle, as well as loss of use and administrative fees. *Id.* Brown's insurance company paid for the repairs, but Brown refused to pay the other charges, contending that they were covered by a Loss Damage Waiver provision in the rental agreement. *Id.* After Budget hired a collection agency, Brown sued, contending that the agency's practices violated the FDCPA. *Id.* The district court dismissed Brown's claim, finding that the FDCPA applied only to transactions involving an extension of credit. *Id.* at 923-24. The Eleventh Circuit reversed, holding that the FDCPA was not limited to such transactions. *Id.* at 925. The court did *not,* however, hold that Brown's obligation in fact constituted a "debt" under the FDCPA. *See Hawthorne,* 140 F.3d at 1371 ("Although we recently held [in *Brown*] that a 'debt' need not require the extension of credit . . . we have not

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The central problem with the majority's analysis is that it oversimplifies the issue in this case. The majority lumps the subrogation provision with the rest of the insurance agreement, without recognizing that not all obligations under the agreement are identical for purposes of the FDCPA. It seems beyond dispute that a consumer's obligation to pay the premiums on an insurance policy "arises out of" the insurance agreement, and thus constitutes a "debt" under the FDCPA. The obligation to pay premiums fits in perfectly with the line of cases cited above. The obligation clearly arises out of a single transaction (the insurance agreement) and pays for a particular service (health insurance).

Subrogation by its very nature, however, cannot fit into this neat paradigm. Subrogation never arises out of a

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previously addressed the limits of the FDCPA's definition of 'debt.' "). Therefore, *Brown* provides no support for Hamilton's contention that a "debt" can arise out of a series of events.

It is true that the Eleventh Circuit remarked in *Hawthorne* that "the facts delineated in *Brown* do not exclude the possibility that the obligation in that case constituted a 'debt' under the FDCPA." *Hawthorne,* 140 F.3d at 1373. But the court made that remark in order to distinguish *Brown* from the case before it. In *Hawthorne,* an insurance company brought a subrogation claim against a tortfeasor. *Id.* at 1369. The tortfeasor sued the debt collection agency, claiming violations of the FDCPA. *Id.* The Eleventh Circuit found that the tortfeasor's alleged obligation did not constitute to a "debt" because it did not arise out of a consensual transaction; there was never *any* agreement between the tortfeasor and the insurance company for the injured party. *Id.* at 1371. The court contrasted *Brown* by noting that "Brown's obligations arose at least in part out of a business transaction where Brown contracted for what appear to be personal services (the truck rental and the loss damage waiver protection)." *Id.* at 1373. The *Hawthorne* court did not state that the obligation in *Brown* should be considered a "debt" for purposes of the FDCPA.

single transaction. Subrogation is "[t]he substitution of one person in the place of another with reference to a lawful claim[.]" BLACK'S LAW DICTIONARY 1427 (6th ed. 1990). In essence, subrogation is an assignment. *See Rohner, Gehrig & Co. v. Capital City Bank,* 655 F.2d 571, 579 (5th Cir. 1981) (observing that, under the law of many states, "a subrogation agreement is equivalent to an assignment"). One person (the subrogor) assigns to another person (the subrogee) a claim that the subrogor has against a third party. In the health insurance context, this concept plays out as follows: an insurance company promises the insured that, in case of an accident, it will pay his medical bills. The insured no longer has to worry about recovering from a tortfeasor or any other source because the insurance company has agreed to cover his medical costs. The insured party (the subrogor) therefore assigns to the insurance company (the subrogee) his right to recover from a tortfeasor or other source. But that subrogation claim does not arise until the insured is actually in an accident, and has the right to receive money from the third party. Thus, a subrogation claim *cannot* arise out of a single transaction between two parties.[4]

Nor does a consumer, by paying a subrogation claim, receive a particular good or service. If valid, United's

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[4] Indeed, the relationship between an insured individual and an insurance company is not typically described as a debtor-creditor relationship. Instead, the insured party (the accident victim) is considered "the creditor" and the tortfeasor (or other party that owes the insured money) is "the debtor." *See* Jeffrey A. Greenblatt, *Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last?* 64 U. CHI. L. REV. 1337, 1340 (1997). The insured and the insurance company are known as the "subrogor" and "subrogee," respectively. *Id.*

subrogation claim would serve two purposes, neither of which directly benefits Hamilton. First, the subrogation claim would reimburse United for paying Hamilton's medical bills. Second, the claim would prevent Hamilton, the insured victim, from receiving money from both United and State Farm and thereby being overcompensated for his injuries. *See* Greenblatt, *supra,* at 1340-41 (noting that subrogation serves to reimburse the insurance company and prevent the insured from being "unjustly enriched").[5] Thus, unlike the "debts" discussed above – the obligations to pay homeowners' association dues, water and sewer bills, or rent – Hamilton's alleged obligation does not pay for a particular good or service. Indeed, Hamilton does not receive any direct benefit for paying a subrogation claim.[6]

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[5] When an insurance company collects from the tortfeasor that caused the accident, subrogation serves a third purpose: "it places the burden of compensation on the tortfeasor and thus deters injurious behavior." Greenblatt, *supra,* at 1341. Because HRI is attempting to recover payments made by State Farm, this third factor is not at issue in the instant case.

[6] It may be that insured individuals do benefit *indirectly* from subrogation. Insurance companies may be able to reduce their costs through subrogation. They might pass these savings along to their customers in the form of lower premiums. *See* Greenblatt, *supra,* at 1354-55 (suggesting that insurance companies can take subrogation into account in setting their rates, and set lower rates for customers that agree to subrogation); Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law,* 108 HARV. L.REV. 1785, 1870 n. 292 (1995) (similarly opining that insurance companies might lower rates *ex ante* if they are likely to recover their costs through successful subrogation claims). In paying a subrogation claim, however, an insured party who has been injured in an accident is not paying for this particular benefit.

Prior to the accident, the insured party might have benefitted when *other* accident victims paid subrogation claims. That would be the case *if* the insurance company passed off its savings (the reduction in costs resulting from subrogation) onto its consumers in the form of lower

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On the contrary, United's subrogation claim, if valid, would prevent Hamilton from receiving a "windfall" by collecting from both United and State Farm.[7]

This last point helps underscore why it would be inappropriate to apply the FDCPA in this case. Hamilton's obligation does not fit our traditional conception of "debt." United is not demanding money from a poor consumer who has recently been down on his luck. United has already paid Hamilton's medical bills. Now State Farm has given Hamilton money to pay for essentially the same expenses. United's subrogation claim, if valid, would simply prevent Hamilton from being paid twice. The FDCPA was not designed to cover this case. The Act was drafted to protect consumers who were having difficulty paying their debts. It was not intended to protect an accident victim, who attempts to get a "windfall" by receiving money from multiple sources.

There is no support in either text or precedent for the majority's conclusion that an obligation to pay an insurance subrogation claim constitutes a "debt" for purposes of applying the FDCPA. I, therefore, respectfully dissent.

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premiums. After the accident, however, the accident victim himself does not receive any direct benefit by paying the subrogation claim.

[7] Scholars have noted that subrogation serves an important function: by preventing an insured party from being overcompensated for injuries suffered in an accident, it helps reduce the problem of "moral hazard" – the possibility that an insured party might deliberately put himself at risk in order to obtain a "windfall." Alan O. Sykes, *Subrogation and Insolvency,* 30 J. LEGAL STUD. 383, 384 (2001) (observing that the "public policy against such 'windfalls' is an oft-stated rationale for subrogation").

MINUTE ENTRY
BARBIER, J.
JULY 13, 2001

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KYLE M. HAMILTON	CIVIL ACTION
VERSUS	NO: 01-585 c/w 01-650
UNITED HEALTHCARE OF LOUISIANA, INC.	SECTION: "J"(4)

(Filed Jul. 16, 2001)

Before the Court is a **Motion for Judgment on the Pleadings and/or for Summary Judgment (Rec. Doc. 51)**, filed by defendant Healthcare Recoveries, Inc., in Civil Action 01-650. Plaintiff, Kyle Hamilton, opposes the motion. The motion was set for hearing, with oral argument, on June 20, 2001. Following oral argument, the Court took the matter under advisement.[1]

Having considered the applicable law and the arguments presented by counsel, the Court now concludes, for the reasons that follow, that the motion should be GRANTED IN PART AND DENIED IN PART. The motion is GRANTED with respect to the federal Fair Debt Collection Practices Act claims because the Court concludes that Plaintiff does not state a claim under the Act. The motion

[1] Plaintiff filed a Motion for Partial Summary Judgment (Rec. Doc. 49) which was also set for hearing on June 20, 2001. The Court denied that motion in open court that same date. *See* Rec. Doc. 60.

is DENIED WITHOUT PREJUDICE as to the state law claims pending a determination as to the Court's subject matter jurisdiction over those claims.

Background

The Court previously recounted this case's factual and procedural background when remanding Civil Action 01-585, which had been consolidated with the instant suit. *See Hamilton v. United Healthcare Inc.*, 2001 WL 536300 (E.D. La. May 17, 2001). To the extent necessary to comprehend the legal issues currently before the Court, a brief recitation of the relevant background information follows.

In October 1999, Plaintiff was seriously injured in a motor vehicle accident. Plaintiff's group health insurer, United Healthcare of Louisiana, Inc. ("United"), an entity not a party to the instant suit, paid for various medical and other services necessitated by the accident. Plaintiff also collected the proceeds from his uninsured and/or underinsured motorist ("UM") policy. Shortly thereafter, defendant Healthcare Recoveries, Inc. ("HRI"), acting pursuant to a contractual arrangement with United, contacted Plaintiff in an attempt to enforce subrogation rights that United claimed to have against the proceeds from Plaintiff's UM policy. Plaintiff, through his counsel, forfeited $57,757.06 of the UM proceeds to HRI for disbursement to United.

Plaintiff filed Civil Action 01-585 in state court seeking to recoup those funds and enjoin further attempts by United and HRI to seek reimbursement from any future proceeds under the UM policy. After United removed the case to this Court, Plaintiff filed the instant suit, Civil Action 01-650, against HRI claiming that HRI's efforts to

enforce United's subrogation rights violated the Fair Debt Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C. § 1692, *et seq.*, as well as the Louisiana Unfair Trade Practices Act ("LUTPA"), La. R.S. 51:1401, *et seq.*[2] The cases were consolidated in this Court. On May 17, 2001, the Court remanded Civil Action 01-585 to state court after concluding that United had failed to establish subject matter jurisdiction. Rec. Doc. 48; *Hamilton v. United Healthcare Inc.*, 2001 WL 536300 (E.D. La. May 17, 2001). HRI then filed the instant Motion for Judgment on the Pleadings and/or for Summary Judgment (Rec. Doc. 51).

Discussion

In support of its motion, HRI argues that Plaintiff does not state a claim under the FDCPA because HRI is not a "debt collector" within the meaning of the Act, and because the subrogation claim that HRI sought to enforce on behalf of United was not a "debt" within the meaning of the Act.[3] HRI also argues that as a disclosed agent for United, it is not independently liable for alleged violations

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[2] Plaintiff's FDCPA claims against HRI are premised in part upon his argument that La. R.S. 22:663 precludes *United* from seeking reimbursement from the UM policy proceeds. This contention is the crux of Civil Action 01-585, which is now proceeding in state court.

[3] For purposes of determining whether Plaintiff states a claim under the FDCPA, the Court need not assume that United had a valid subrogation claim against the proceeds of Plaintiff's UM policy. *See McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992) (holding that the Act applies regardless of whether a valid debt actually exists). The validity *vel non* of United's subrogation claim is currently before the state court in Civil Action 01-585. Accordingly, this Court makes no determination on that issue, and nothing contained in this ruling should be construed or interpreted otherwise.

of Louisiana law committed while acting within the scope of its agency.

1. *Applicable Legal Standards*

In considering a motion to dismiss,[4] the complaint should be construed in favor of the plaintiff, and all facts pleaded should be taken as true. *Southern Christian Leadership Conf. v. Supreme Court of the State of Louisiana,* ___ F.3d ___, 2001 WL 575601, at *4 (5th Cir. 2001) (citing *Brown v. NationsBank Corp.*, 188 F.3d 579, 585-86 (5th Cir. 1999)). A Rule 12(b)(6) dismissal is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 101, 2 L. Ed. 2d 80 (1957)). "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Collins v.*

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[4] To the extent HRI asserts that the subrogation claim was not a "debt" within the meaning of the FDCPA, HRI is in effect urging a Rule 12(b)(6) motion to dismiss. HRI styled its motion as one for judgment on the pleadings or in the alternative for summary judgment likely because the Court had denied a previous pre-answer motion to dismiss filed by HRI. That motion was denied on May 16, 2001, yet HRI to date has filed no answer to the original complaint and Plaintiff has not sought a default judgment. A Rule 12(c) motion is only proper where defendant has filed an answer to the complaint, *see Jones v. Greninger,* 188 F.3d 322, 324 (5th Cir. 1999), which means that HRI's motion, as it pertains to the "debt" issue, will be treated as one under Rule 12(b)(6). Rule 12(b)(6) defenses are not waived by failure to timely assert them, *see* Rule 12(h)(2), notwithstanding that failure to comply with the deadlines set forth in Rule 12(a) can leave defendant vulnerable to default, *see* Rule 55(a).

Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir. 2000) (citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357, at 601 (1969)).

2. *FDCPA Claims*

The FDCPA was enacted in part to protect consumers from "abusive debt collection practices by debt collectors." 15 U.S.C.A. § 1692(e) (West 1998); *McKenzie v. E.A. Uffman & Assocs., Inc.,* 119 F.3d 358, 360 (5th Cir. 1997) (citing § 1692(e); *Taylor v. Perrin, Landry, DeLaunay & Durand,* 103 F.3d 1232 (5th Cir. 1997)). The Act enumerates several abusive and unfair practices considered contrary to that goal, and forbids debt collectors from taking such action. *Poirer v. Alco Collections, Inc.,* 107 F.3d 347, 349 (5th Cir. 1997).

A threshold requirement for application of the FDCPA is that the obligation at issue qualify as a "debt" as that term is defined in the Act. *Hawthorne v. Mac Adjustment, Inc.,* 140 F.3d 1367, 1371 (11th Cir. 1998) (citing *Mabe v. G.C. Servs. Ltd. Part.,* 32 F.3d 86 (4th Cir. 1994); *Zimmerman v. HBO Affiliate Group,* 834 F.2d 1163 (3d Cir. 1987)); *Riebe v. Juergensmeyer & Assocs.,* 979 F. Supp. 1218, 1220 n.3 (N.D. Ill. Oct. 31, 1997). The FDCPA defines a "debt" as

> [A]ny obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C.A. § 1692a(5) (West 1998).

As the definition makes clear, the term "debt" is not used in the broadest possible sense because "not all obligations to pay are considered 'debts' under the act." *Bass v. Stolper, Koritzinsky, Brester & Neider,* 111 F.3d 1322, 1324 (7th Cir. 1997); *Garner v. Augustine, Kern & Levins, Ltd.,* 1994 WL 48589 (N.D. Ill. Feb. 16, 1994). Rather, the term "debt," as defined in the Act, serves to limit the scope of the FDCPA to specific types of obligations, *i.e.,* "those obligations to pay arising from consensual transactions, where parties negotiate or contract for consumer-related goods or services." *Bass,* 111 F.3d at 1326 (citing *Shorts v. Palmer,* 155 F.R.D. 172 S.D. Ohio 1994); *Mabe,* 32 F.3d at 88).[5] Accordingly, an insurer's claim for reimbursement against a tortfeasor is not a "debt" under the FDCPA because the obligation to pay arises from a tort rather than a consumer transaction. *Hawthorne,* 140 F.3d at 1371. And a personal loan used for venture capital in a software company is not a "debt" because its use is business-related or commercial in nature rather than personal or household. *Bloom v. I.C. System, Inc.,* 972 F.2d 1067, 1069 (9th Cir. 1992).

Turning now to whether United's subrogation claim constitutes a "debt" so as to bring this case within the ambit of the FDCPA, the Court begins by noting that several key elements of the term "debt" appear to be present in this case. By contracting with United for health coverage, Plaintiff entered a **consensual transaction for**

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[5] The scope of the Act is similarly limited by the terms "debt collector" and "consumer," *Bass,* 111 F.3d at 1324 n.3, two terms defined in the Act, as well as the term "transaction," a term not defined in the Act, *Riebe,* 979 F. Supp. at 1220-21.

insurance, a good specifically enumerated in the definition. Unarguably, Plaintiff purchased that insurance for **personal or family use**. And to the extent that United has a valid subrogation claim, Plaintiff is **obligated to pay money** to United. Having clearly met all these requirements, the more problematic question, however, is whether the obligation to pay that Plaintiff now faces "arises out of" his transaction with United. Surely, but for his health insurance contract with United, Plaintiff's recovery on the UM policy proceeds would create no obligation with respect to United. The issue then is how broadly the term "arises out of" should be interpreted under the Act, *i.e.,* does an obligation to reimburse one's insurer on a contractual subrogation claim *arise out of* the policy of insurance *for purposes of applying the FDCPA.*

To the Court's knowledge, only one federal court has addressed the issue presented here. In *Garner v. Augustine, Kern, & Levens, Ltd.,* the district court held that an employee benefit plan's reimbursement claim against its insured was *not* a "debt" for purposes of the FDCPA. 1994 WL 48589, at *2 (N.D. Ill. Feb. 16, 1994). In reaching that conclusion, the Court reasoned that where insurance is the consumer good at issue, the Act was meant to cover the situation where an consumer contracts for insurance coverage but then fails to pay the premium. *Id.* The court expressly found that the Act was not intended to apply to any potential reimbursement claim owed by a plan beneficiary after benefits are paid on his behalf. *Id.* To hold otherwise, the court concluded, "would unduly strain the normal meaning of the language that has been used by Congress" in the Act. *Id.*

Although the *Garner* decision is not binding on this Court, the Court nevertheless agrees with the district

judge's conclusion that a contractual subrogation claim, while in fact "arising out of" the contract of insurance, is not the kind of payment obligation that Congress intended when it created the FDCPA for the protection of consumers. All of the cases cited by Plaintiff involve an obligation to pay as a quid pro quo for the consumer goods received. *See, e.g., Brown v. Budget Rent-A-Car Systems, Inc.,* 119 F.3d 922 (11th Cir. 1997). None involved an obligation as attenuated from the original purchase or transaction as the one involved here. Further, had Plaintiff not engaged in another transaction wholly unrelated to his contract with United, *i.e.,* obtaining his own UM policy through another insurer, no obligation would exist.[6]

Furthermore, other parts of the statute suggest that the reimbursement claim at issue here is not the type of obligation contemplated by the Act. For example, another threshold requirement for the Act's applicability is that the defendant qualify as a "debt collector" for purposes of the Act. *See* 15 U.S.C.A. § 1692(e). That term has a comprehensive definition which expressly excludes any person collecting a debt that was "*not in default* at the time it was obtained." 15 U.S.C.A. § 1692a(6)(F)(iii) (emphasis added). Accordingly, the applicability *vel non* of the Act can at times turn on the default status of the debt. However, as was evident at oral argument, trying to apply the otherwise simple debtor concept of "default" to the obligation

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[6] In his opposition, Plaintiff argues that *Garner* was incorrectly decided because the district judge engrafted a credit extension requirement into the definition of "debt." Rec. Doc. 53, at 4. Even a cursory review of the decision belies that assertion so the Court can only assume that counsel mistakenly confused the *Garner* case with another. Plaintiff made no other arguments to call *Garner* into doubt.

here is problematic because it is unclear when, if ever, this subrogation claim went into default. Any obligation could not have arisen before Plaintiff received the UM policy proceeds and surely the obligation was not in default at its inception. Thus, the point in time at which this type of obligation goes into default is wholly unclear, rendering a potentially key element of the Act, *i.e.*, whether the defendant is in fact a "debt collector," unworkable.

In sum, the Court concludes that the subrogation claim at issue here is not a "debt" for purposes of the FDCPA. Consequently, Plaintiff does not state a claim for relief under the Act. Given that the "debt" issue is dispositive of HRI's motion, the Court need not address the parties' arguments on the "debt collector" issue. Accordingly, Plaintiff's claims under the FDCPA are dismissed with prejudice.

Nevertheless, the Court recognizes that Plaintiff's arguments with respect to the "debt" issue are not wholly without merit. Given the paucity of decisions addressing a factual scenario like the one in this case, and the absence of controlling authority in this circuit, the Court would consider certifying this decision, as it pertains to the FDCPA claims, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Accordingly, the parties are to file memoranda on the propriety *vel non* of such a certification by ***July 27, 2001***.

3. *State law claims*

If Plaintiff's FDCPA claim had been the sole basis for federal subject matter jurisdiction, the Court would have declined to exercise supplemental jurisdiction over Plaintiff's state law claims. *See* 28 U.S.C. § 1367(c)(3) (West

1993). Nevertheless, Plaintiff also pled jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) (diversity jurisdiction). Although the parties appear to be of diverse citizenship, on the current record, it is unclear whether the amount in controversy exceeds $75,000. Accordingly, the parties are to file memoranda on the issue of diversity jurisdiction by ***July 27, 2001***. Assuming that the Court determines that it has an independent basis for subject matter jurisdiction over the remaining state law claims, HRI can reurge its motion for summary judgment at a later date.

Accordingly,

IT IS ORDERED that the **Motion for Judgment on the Pleadings and/or for Summary Judgment (Rec. Doc. 51)** filed by defendant Healthcare Recoveries, Inc. should be and is hereby **GRANTED IN PART AND DENIED IN PART**. The motion is **GRANTED** insofar as Plaintiff's claims under the Fair Debt Collection Practices Act are **DISMISSED WITH PREJUDICE**. The motion is **DENIED WITHOUT PREJUDICE** as to the state law claims pending a determination by the Court on the issue of subject matter jurisdiction;

IT IS FURTHER ORDERED that the parties are to file memoranda addressing the issue of diversity jurisdiction over Plaintiff's state law claims and propriety of certification pursuant to 28 U.S.C. § 1292(b) by ***July 27, 2001***.

[/s/ CJB]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KYLE M. HAMILTON	CIVIL ACTION
VERSUS	NO. 01-650 c/w 01-585
HEALTHCARE RECOVERIES, INC.	SECTION "J"

JUDGMENT

(Filed Oct. 3, 2001)

Considering the court's Order and Reasons dated July 13, 2001 and August 17, 2001, filed herein,

IT IS ORDERED ADJUDGED AND DECREED that there be judgment in favor of defendant, Healthcare Recoveries, Inc., and against plaintiff, Kyle M. Hamilton, dismissing the plaintiff's suit without prejudice as to the state law claims and with prejudice under the Fair Debt Collection Practices Act.

New Orleans, Louisiana, this 3rd day of OCTOBER, 2001.

/s/ Carl J. Barbier
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31179

KYLE M HAMILTON

Plaintiff

v.

UNITED HEALTHCARE
OF LOUISIANA, INC

Defendant

KYLE M HAMILTON

Plaintiff-Appellant

v.

HEALTHCARE RECOVERIES, INC

Defendant-Appellee

Appeals from the United States District Court
for the Eastern District of Louisiana, New Orleans

ON PETITIONS FOR REHEARING AND
REHEARING EN BANC

(Filed Jan. 29, 2003)

(Opinion 11/01/02, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, EMILIO M. GARZA, and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ CARL E. STEWART
UNITED STATES CIRCUIT JUDGE

EMILIO M. GARZA, Circuit Judge, concurring in part and dissenting in part. Judge Garza would grant a rehearing on behalf of Healthcare Recoveries, Inc., but would deny a rehearing by Kyle Hamilton.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 99-10062-Civ-Paine

WILLIAM CONTE and AARON GIDEON, on behalf of all others similarly situated,

Plaintiffs,

vs.

HEALTH CARE RECOVERIES, INC.

Defendant.

_____/

ORDER

(Filed Jan 29, 2001)

This matter is before the court on Defendant's Motion to Dismiss, filed on or about November 5, 1999 (D.E. #30). Upon review of the motion, and the responses thereto, the court finds that the motion should be granted in part for the reasons set forth below.

PROCEDURAL BACKGROUND

Plaintiffs William Conte and Aaron Gideon, beneficiary and participant respectively under health insurance plans subject to the Employee Retirement Income Security Program ("ERISA"), instituted this action against Defendant Healthcare Recoveries, Inc., ("HCRI") in June 1999, on behalf of themselves and a nationwide class of insureds

(the "putative class").[1] Plaintiffs claim that HCRI wrongfully attempted to enforce subrogation and reimbursement rights of ERISA-governed health plans (for which non-defendant United Health Care ("UHC") provides claim administration), in violation of the federal common law "make whole" doctrine, the Fair Debt Collection Practices Act, and several state laws.

Plaintiffs assert five claims against HCRI in their First Amended Class Action Complaint (D.E. #21):

> (1) Count I is an action for declaratory judgment that HCRI's subrogation/reimbursement liens violated the federal common law "make whole" doctrine;
>
> (2) Count II is a claim under the Fair Debt Collection Practices Act;
>
> (3) Count III is a claim under Florida law for unjust enrichment, requesting the imposition of a constructive trust;
>
> (4) Count IV is an action for common law fraud/fraudulent inducement under Florida law;

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[1] Plaintiffs and the putative class are those insureds who, during the period of June 15, 1994, through the present, obtained recoveries from third parties in amounts less that required to make him/her whole as a result of his/her loss caused by said third parties, and whose recoveries were than further diminished by HCRI's assertion of and/or recovery by subrogation/reimbursement liens on the insureds' settlements.

The court notes that Plaintiffs' have filed a Motion to Certify Class Action (D.E. #45), which is still pending before this court.

(5) Count V is a claim under the Florida Consumer Collection Practices Act.

HCRI has filed this Motion to Dismiss Plaintiffs' claims.

STANDARD OF REVIEW

To state a claim, Fed. R. Civ. P. 8(a) requires, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." The court must "take the material allegations of the complaint and its incorporated exhibits as true, and liberally construe the complaint in favor of the Plaintiff." *Burch v. Apalachee Community Mental Health Services, Inc.*, 840 F.2d 797, 798 (11th Cir. 1988) (citation omitted), *aff'd*, 494 U.S. 113 (1990). The law in this Circuit is well-settled that "the 'accepted rule' for appraising the sufficiency of a complaint is 'that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *SEC v. ESM Group, Inc.*, 835 F.2d 270, 272 (11th Cir. 1988) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)), *cert. denied*, 486 U.S. 1055 (1988). The moving party bears a heavy burden. *St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am.*, 795 F.2d 948, 953 (11th Cir. 1986).

In analyzing a Rule 12(b)(6) motion where a class had not yet been certified, such as the instant motion, the court must analyze the named plaintiffs claims individually in order to determine if a legally sufficient claim exists. *See Griffin v. Dugger*, 823 F.2d 1476, 1483 (11th Cir. 1987).

ANALYSIS

Count I: Declaratory Judgment

In Count I, plaintiffs seek a declaration, *inter alia*, that HCRI's assertion of subrogation/reimbursement rights violated the "make whole" doctrine. The "make whole" doctrine derives from federal common law and provides that before an insurer or subrogee is entitled to exercise its subrogation/reimbursement rights, its insured must have received from the third party tortfeasor an amount which compensates the insured for his/her total loss. *See, e.g., Guy v. Southeast Iron Workers' Welfare Fund,* 877 F.2d 37 (11th Cir. 1989). If the insured does not obtain complete relief (i.e. is made "whole"), the insurer or subrogee cannot exercise a right of subrogation/reimbursement.[2] *Id.*

In *Cagle v. Bruner,* 112 F.3d 1510, 1521 (11th Cir. 1997), this circuit held that the "make whole" doctrine is a default rule in ERISA cases, and parties may opt to contract out of the doctrine. (Citation omitted). Defendant contends that because the "make whole" doctrine is a rule of contract, HCRI, as a non-party to the original health plan contract,[3] cannot be sued.

While this court recognizes the widely-accepted principle of law that an agent of a disclosed principal

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[2] The "make whole" doctrine may be expressly disavowed by the subject plan. *See, e.g. Cagle v. Bruner,* 112 F.3d 1510, 1521 (11th Cir. 1997). In this instance, neither party alleges that the subject plan(s) contained a provision disavowing the "make whole" doctrine.

[3] Defendant contends that, at most, HCRI was an agent of a disclosed principal.

cannot be sued in contract, the court is inclined to agree with plaintiff's interpretation of this action as one in tort. Indeed, if plaintiffs could not enforce the "make whole" doctrine against HCRI, the foundation of the doctrine itself would be in jeopardy. If the doctrine could be circumvented, insurers would have an incentive to contract out rights to subrogation/reimbursement in order to break through the limitations of the "make whole" doctrine. Perhaps recognizing this potential controversy, other courts have suggested that an agent of a health care payor is subject to the "make whole" doctrine. *See Phillips v. Healthcare Recoveries, Inc.*, 238 F.3d 423 (6th Cir. 2000) (unpublished opinion at 2000 WL 1872058) (affirming a decision that defendant, as an agent of health care payor, is subject to the "make whole" doctrine).

In light of *Cagle* and this circuit's application of the "make whole" doctrine, this court finds dismissal is inappropriate for Count I.

Count II: Fair Debt Collection Practices Act

Plaintiffs allege that HCRI violated the Fair Debt Collection Practices Act (the "Act") by using fraudulent, deceptive and/or misleading representations in its attempts to collect amounts owned by plaintiffs and the putative class to their insurers for medical and related expenses by wrongfully asserting subrogation/reimbursement liens in violation of the federal common law "make whole" doctrine. Defendant asserts that the subrogation/reimbursement liens are not a "debt" within the meaning of the Act.

The Fair Debt Collection Practices Act, codified at 15 U.S.C. § 1692, *et seq.*, seeks to "eliminate abusive debt

collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). In their complaint, Plaintiffs specifically allege that Defendant violated §§ 1692e(2)(A) and 1692e(10) of the Act.[4] In order for § 1692e to apply, a debt must exist. *See, e.g. Hawthorne v. MAC Adjustment, Inc.,* 140 F.3d 1367 (11th Cir. 1998); *Mabe v. G.C. Servs. Ltd. Partnership,* 32 F.3d 86, 88 (4th Cir. 1994). The Act defines a debt as "any obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to a judgment." 15 U.S.C. § 1692a(5) (emphasis supplied).

In *Hawthorne,* the Eleventh Circuit addressed the limits of the act's definition of "debt," determining the requisite transaction comprising a debt must arise from

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[4] These sections provide, in pertinent part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (2) The false representation of –
>
> (A) the character amount, or legal status of any debt
>
> . . .
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

consensual or contractual arrangements. *Hawthorne,* 140 F.3d at 1371. Accordingly, the *Hawthorne* court concluded that an alleged obligation to pay damages resulting from an accident[5] does not arise from such consensual or contractual arrangement, and, therefore, held that an insurance subrogation claim was not a "debt" within the meaning of the Act.

Similarly, other courts have recognized that a debt, under the meaning of the Act, does not exist where an employee or his or her beneficiary under an employee benefit plan has received benefits that may give rise to a reimbursement obligation under that plan. *See Garner v. Augustine, Kern and Levens, Ltd.,* 1994 WL 48589.[6]

In the instant case, plaintiffs incurred a loss as a result of tortious acts of third parties. When plaintiffs received recoveries from said third parties compensating them for a portion of their loss, defendant HCRI asserted subrogation/reimbursement liens on the insureds' settlements. The court finds this situation analogous to those recounted in *Hawthorne* and *Garner* in that plaintiffs did not have a consensual or contractual relationship with the

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[5] The *Hawthorne* court reached this conclusion, noting the fact that the insurer entered into a contract with the plaintiff [party seeking subrogation rights] does not change the reality that there was no consensual arrangement between plaintiff and the damaged party, the damaged party's insurer or the party seeking subrogation rights. *Hawthorne v. MAC Adjustment, Inc.,* 140 F.3d at 1371.

[6] This court notes that, contrary to the facts of this case, the plaintiff in *Garner* intentionally withheld information about possible subrogation/reimbursement benefits. Notwithstanding this distinction, this court finds that the general principle enunciated by the *Garner* court is applicable to the instant case.

third parties who committed torts against them. As a result, this court concludes that the alleged insurance subrogation/reimbursement claims are not a "debt" within the meaning of the Fair Debt Collection Practices Act, and that this count must be dismissed.

Counts III, IV and V: The State Law Claims

The "preemption clause" of ERISA provides that ERISA supersedes all state laws insofar as they "relate to any employee benefit plan." Employee Retirement Income Security Act Sec. 514(a), 29 U.S.C. 1144(a). The "relate to" language has been interpreted broadly to include any state statutory and common law claims that have "a connection with or reference to" an ERISA plan. *See First National Ins. v. Sunshine-Jr. Food Stores,* 960 F.2d 1546, 1549-50 (11th Cir. 1992). Further, the "relate to" language of the ERISA preemption clause has been applied to state statutory and common law claims asserted against a non-ERISA entity (such as the defendant in this matter), where the claims not only have a connection with or reference to an ERISA plan, but also **affect the relationship** between a plan and its beneficiaries. *See Morstein v. National Ins. Servs., Inc.,* 93 F.3d 715, 722 (11th Cir. 1996) (emphasis supplied); *Garren v. John Hancock Mut. Life Ins. Co.,* 114 F.3d 186, 188 (11th Cir. 1997). Thus, in order to apply federal preemption in this instance, there must exist two elements: (1) state claims must have a connection with or reference to an ERISA plan, and (2) state claims must effect the relationship between a plan and its beneficiaries.

"Connection with or Reference to ERISA Plan"

The Eleventh Circuit has found a sufficient relationship between the state claims and the ERISA-governed employee benefits plan to exercise federal preemption where a plan's terms are "critical" to the resolution of a said claims. *See Hall v. Blue Cross/Blue Shield,* 134 F.3d 1063, 1065 (11th Cir. 1998); *see also Franklin v. OHG of Gadsen, Inc.,* 127 F.3d 1024 (11th Cir. 1997). The *Hall* court noted:

> [S]ubstantiating Hall's allegations that Blue Cross misrepresented the scope of its coverage for preexisting conditions ultimately requires a comparison between the agents' statements and the written policy. This necessary resort to the terms and provisions of Blue Cross's employee benefit plan plainly implicates ERISA. Hall's state law fraudulent inducement claims are therefore related to Blue Cross's administration of an ERISA-governed plan and, as such, are preempted. *Id.* at 1065-1066.

The state claims in this case seek redress against HCRI for falsely asserting rights that do not exist under the ERISA health insurance plans. The analysis of HCRI's enforcement of subrogation/reimbursement rights under plaintiffs' plans necessarily requires the court examine the original subject plans to which HCRI is asserting such subrogation/reimbursement rights. The state claims cannot be resolved without examining the applicable plain language of the ERISA plans. Thus, the first prong of the preemption analysis is met.

Affect on Relationship Between a Plan and its Beneficiaries

Preemption has been applied in cases where state law claims are brought against non-ERISA entities, such as here, where the state claims will affect the relationship between plaintiffs and the ERISA plans of which they are beneficiaries. *See, e.g. Morstein v. National Ins. Servs., Inc.,* 93 F.3d at 722. For example, this district has pre-empted a beneficiary's tortious interference claim against his successor employer a non-ERISA entity, where defendant's alleged conduct was "directly 'intertwined'" with a former employer's refusal to pay benefits. *See Somoano v. Ryder Sys., Inc.,* 6 F.Supp.2d 1342, 1344-1345 (S.D. Fla. 1998). Another court in this circuit has determined that where a plaintiff brings state law claims relating to an ERISA plan against an insurance company which issued the policy, paid the benefits, and made the decisions regarding eligibility for benefits, and **against its agent**, the defendants are ERISA entities. *See Culpepper v. Protective Life Ins. Co.,* 938 F.Supp. 794 (M.D. Ala. 1996) (emphasis supplied);[7] *See also Cavender v. East Alabama Medical Center,* 1996 WL 1057533 at *3 (finding that defendant was an ERISA entity, **or agent thereof**, and claims could be preempted).

In the instant action, plaintiffs assert state law claims against HCRI- a non-ERISA entity, but an agent of the health care payor. However, the state claims seek a determination of subrogation/reimbursement rights of the

[7] The court notes that in the instant action plaintiffs have only sued the insurer's agent, HCRI, and not the insurer itself.

health care payor, admittedly an ERISA entity, under ERISA plans. Whether the ERISA entity is asserting those rights itself, or through a contractual appointee, as here, is of no moment. The resolution of these claims will inevitably affect the relationship between plaintiffs and the ERISA plans of which they are beneficiaries. Thus, the second prong of the preemption analysis is also met. Accordingly, this court finds that plaintiffs state claims (Counts III, IV, and V) are preempted by ERISA and should be dismissed. It is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED IN PART. Counts II, III, IV, and V are DISMISSED. It is further

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is DENIED IN PART. Count I is the only claim from Plaintiffs' First Amended Class Action Complaint to survive Defendant's Motion.

DONE AND ORDERED at West Palm Beach, Florida, this 29th day of June, 2001.

/s/ James C. Paine
UNITED STATES
DISTRICT JUDGE